COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3040-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. FRIES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed.*.

DEININGER, J.[1] David L. Fries appeals from a judgment convicting him of second-offense operating a motor vehicle while under the influence of an intoxicant (OMVWI), § 346.63(1)(a), STATS. He claims the trial court erred in denying his suppression motion grounded on lack of probable cause

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

for arrest. We conclude that the trial court did not err in denying the suppression motion. Accordingly, we affirm the judgment of conviction.

BACKGROUND

On June 3, 1995, a Richland County Sheriff's deputy observed Fries' car parked in the parking lot of a closed business at approximately 1:00 a.m. Shortly thereafter, the deputy again spotted Fries' car traveling on State Highway 58, several car lengths ahead of the deputy's squad car.

The deputy observed Fries' car move from "halfway on the shoulder" to the highway center line, crossing the center line on at least three occasions. When the deputy stopped the vehicle, Fries immediately got out of his car and walked toward the squad car. The deputy ordered Fries to stay with his vehicle over his P.A. system. The deputy quickly got out of the squad car, went to Fries, who was then standing by or behind his vehicle, and patted him down for weapons. At the suppression hearing, the deputy justified the immediate pat down by stating that he was concerned for "officer safety" because of Fries' rapid approach toward the squad car, and that the pat down was "to make sure he did not have a weapon."

During his subsequent investigation, the deputy testified that he perceived a "moderate" odor of intoxicants on Fries' breath and observed that Fries' eyes were glassy and bloodshot. The deputy also testified that Fries' speech was slurred and that he had difficulty with balance, requiring a hand on the hood of the car to maintain balance. Fries told the deputy that he had been at a tavern and had been drinking. The deputy requested Fries to perform the alphabet test, and on the first try, Fries got to the midpoint of the alphabet and stopped. The deputy gave him an opportunity to try again, but Fries declined stating "that he

could not recite the alphabet on this particular evening." After administering a preliminary breath test (P.B.T.), which showed the presence of alcohol on Fries' breath, the deputy arrested Fries for OMVWI, handcuffed him, and transported him to the sheriff's department in the squad car for processing and Intoxilizer testing.

At the hearing on Fries' suppression motion, he argued that the State had not met its burden to establish probable cause for his OMVWI arrest. Fries did not challenge the basis for the original stop or the propriety of the pat down for weapons. His counsel prefaced his argument on the lack of probable cause for the arrest as follows:

> In this case the officer did, in essence, did a Terry stop. The man got out of the car. He was concerned. He patted him down, didn't find any weapons, and all he noticed at this point is a moderate odor, something about his speech ….

The trial court reviewed the evidence regarding the deputy's observations, Fries' statements, and the results of the alphabet test and P.B.T., and concluded "all of those things together would constitute probable cause to make the arrest." After the suppression motion was denied, Fries pleaded no contest and was convicted of OMVWI, as a second offense.

ANALYSIS

Fries' first argument, to which he devotes a substantial portion of his brief, is that the deputy's immediate pat down search for weapons was an impermissible frisk, undertaken without a reasonable, particularized suspicion that the defendant was potentially "armed and dangerous." Fries claims that since this frisk exceeded the scope of a ***Terry*** stop, it converted the traffic stop into an arrest

at that early juncture. And, since this occurred prior to most, if not all, of the deputy's observations and Fries' statements, Fries urges us to conclude that there was no probable cause for an arrest at the time of the de facto arrest by frisking.

The State correctly notes that this argument was not raised in any fashion before the trial court. It was not included in Fries' original motion, nor was it briefed or argued to the trial court at the time of the suppression hearing. The trial court did not, therefore, have the opportunity to analyze the issue or to comment upon any facts in the record that might be relevant to it.

We conclude that Fries has waived the issue of whether the deputy's immediate frisk converted the traffic stop into a de facto arrest without probable cause. ***Wirth v. Ehly,*** 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). We understand that the waiver rule is one of administration, and that we may address the issue if it has been fully briefed and requires no further evidentiary proceedings. ***Id.*** at 444, 287 N.W.2d at 146. We decline to do so here, because we are not convinced that the "`interests of justice'" require us to address the issue. ***Maclin v. State,*** 92 Wis.2d 323, 328-29, 284 N.W.2d 661, 664 (1979) (quoted source omitted). Fries' arguments on this point do not reveal any relevant, binding precedent that would require a reversal of his conviction. Rather, his argument is constructed around a selective reading of the facts adduced at the hearing, and a strained application of federal and Wisconsin precedents regarding what constitutes an arrest.

Thus, we consider only whether the deputy lacked probable cause to arrest Fries for OMVWI when he did effectuate the arrest. On this issue, Fries first argues that there was no foundation laid as to the officer's training in the administration of field sobriety tests and as to the basis for evaluating the results of

the alphabet test. Fries concludes with a general argument that all of the facts and circumstances known to the officer at the time of the arrest did not add up to probable cause.

Fries did not object to the deputy's testimony regarding the administration and results of the alphabet test at the motion hearing. Thus, any argument that this testimony was improperly admitted and considered by the trial court is waived. Section 901.03(1)(a), STATS. Fries' arguments regarding the alphabet test, therefore, go only to the weight and credibility of the alphabet test result as evidence of intoxication, which are matters on which we defer to the trier of fact. *See* ***Rohl v. State,*** 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974).

As the trial court noted, Wisconsin appellate courts have not decreed which specific field sobriety tests must be administered, nor how many must be administered, in order to establish probable cause for an OMVWI arrest. In fact, we have held that field sobriety tests are not required in every case. ***State v. Wille,*** 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). Rather, the test for probable cause in an OWI arrest is the same as that for all arrests: The totality of the circumstances must be examined to determine whether the "`arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant.'" ***State v. Babbitt,*** 188 Wis.2d 349, 356-57, 525 N.W.2d 102, 104 (Ct. App. 1994) (quoting ***State v. Nordness,*** 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986)).

The trial court summarized the State's evidence on probable cause for the arrest as follows:

> THE COURT: Okay. In this case, first, as to probable or reasonable suspicion to stop, it is the Court's opinion that the officer observing the defendant's vehicle going over the centerline on three occasion[s] when there was no reason to go across, obviously, the defendant could be passing a car but there were no cars to pass, and also the time of night, to some extent, and the time of night can also mean a driver[] that's asleep, too, maybe not necessarily intoxicated, but in the middle of the night if somebody is driving irratically [sic], I think the officer has an obligation to stop them. I think up to that point there is no problem.
>
> Okay, the officer then observed an odor of alcohol or intoxicant or moderate odor, and this was outside, not in a vehicle. That certainly indicates that he should investigate further. He testified, and I'm not sure of the exact order that these things occurred to the officer, but that he noticed that the man seemed to be slurring his speech. He had to use, had to put his hand on the car to maintain balance. He found out, he asked the defendant had he been drinking, the defendant said yes. Where had he been? He had been at a tavern that was a few miles down the road. The officer then did a field test in the alphabet. The defendant was not able to do it, and when requested or given a chance to do it the second time, he said he couldn't do it. The officer used a P.B.T. which confirmed that he had been drinking. I think all of those things together would constitute probable cause to make the arrest.

Even though our review of a probable cause determination is de novo, ***State v. Drogsvold,*** 104 Wis.2d 247, 262, 311 N.W.2d 243, 250 (Ct. App. 1981), we conclude that the trial court's summary is an accurate description of the facts of record and an appropriate legal conclusion to draw from those facts. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.